

Access to Justice and the Qualification Directive

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Abstract

The Qualification Directive, adopted by the Council of the European Union in 2004, creates a legal obligation for Member States to grant subsidiary protection to those persons who do not qualify for refugee status but who are in need of protection on the basis of other international obligations of Member States. An element of the Qualification Directive relates to protection from serious harm, as defined in Article 15(c) of the Directive. This article analyses the meaning and application of Article 15(c) in the UK through a selection of cases from failed Afghan asylum seekers in Kent, and identifies the difficulty courts have had in interpreting and applying the provision. It stresses the need for clarification of the terms of Article 15(c) and the impact its lack of clarity has on those applying for subsidiary protection and those in the courts adjudicating on such applications.

Introduction

The 2004 Qualification Directive was introduced as part of the framework for a Common European Asylum System¹ and aims to harmonise the criteria by which Member States define who qualifies as a refugee or are otherwise in need of international protection. Article 15(c), which defines protection from serious harm where there is an individual threat to a civilian's life or person by

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¹ UNHCR, 'Gaining Asylum in the EU' <<http://www.unhcr-centraleurope.org/en/what-we-do/ensuring-legal-protection/eu-asylum-policy.html>> accessed 21 April 2014

reason of indiscriminate violence or internal armed conflict,² has been a subject of contention since its introduction. Disagreements over its transposition, interpretation and implementation into the legal systems of Member States have led to confusion surrounding its meaning and purpose. Article 15(c) begs the question: does it actually provide rights to individuals seeking subsidiary protection as a result of international or internal armed conflict in their home countries? And if not, what is its purpose? This paper aims to discuss that question through an analysis of the interpretation and application of Article 15(c) in the UK and selected other EU Member States. In order to do so, the paper will focus on UK Country Guidance cases specifically dealing with the question of Article 15(c) and a selection of cases of failed asylum seekers in Kent.

‘On Any Reading, Article 15(c) is Tortuously Worded’:³ The Importance of Definition

The statement above captures the difficulty faced by many courts in determining the meaning and proper application of Article 15(c). To delve into the source of this remark, it is worth looking at the provision itself. Article 15(c) defines ‘serious harm’ as: ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. An initial observation is that the wording is prima

² Council Directive (EC) 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the EC Qualification Directive), Article 15(c)

³ *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKAIT 00023, [32]

facie contradictory. How can you prove an 'individual threat' as a result of 'indiscriminate violence'? McAdam articulates this difficulty, stating: 'The individual requirement cannot logically mean that a person must be singled out within a situation of indiscriminate violence, since to require this would be contrary to the notion of violence that is indiscriminate.'⁴

This problem was recognised by the Dutch courts in the case of *Elgafaji*,⁵ who requested a preliminary ruling from the European Court of Justice on the meaning of 'serious and individual threat to life or person' with specific focus on the words 'individual threat' for the purposes of the Directive. The Court defined 'individual' as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence...reaches such a high level that substantial grounds are shown that a civilian...solely on account of his presence on the territory...faces a real risk of being subjected to the serious threat described in 15(c).⁶

The concept of a threat of harm that is irrespective of a person's identity seems to be a reasonable clarification of the term 'individual' since, if the opposite were the case, then a person could qualify for consideration of protection as a refugee under the Refugee Convention reasons of a fear of persecution due to race, religion, nationality or membership of a particular social group. Article 15(c) excludes these Convention reasons as the assessment of protection under 15(c) is only to be carried out once an

⁴ Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 72

⁵ Case C-465/07 *Elgafaji v Staatssecretaris van Justitie (Elgafaji)* [2009] 1 WLR 2100

⁶ *ibid* [35]

applicant has failed to establish a need for refugee protection and therefore seeks protection by other means.⁷

The definition of 'individual' given in the *Elgafaji* case remains ambiguous, however, as what qualifies as a threat of harm to civilians irrespective of their identity and as a result of violence that is indiscriminate (another concept with ambiguous meaning) still remains to be seen in the courts. One may ask, if a threat of harm as a result of factors particular to a person's identity could place them under protection for a Convention reason, then what reasons, irrespective of a person's identity will place them under subsidiary protection to satisfy Article 15(c) of the Qualification Directive? The definition given in the *Elgafaji* case therefore proves to be frustratingly unhelpful, as it does not facilitate a better understanding of 'individual' for the purposes required by the courts.

Proving Individual Threat: A Test of Exceptionality?

Further to determining the meaning of 'individual threat' is the burden on applicants to prove that threat. Taking a specific look at cases from Afghanistan and the situation there, the UK Border Agency's Operational Guidance Note (OGN) on Afghanistan made the comment that to establish a claim under Article 15(c) it is necessary for a claimant 'to establish that particular factors place him or her at additional risk above that which applies

⁷ Gov.uk, 'Humanitarian Protection'

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257431/huma-prot.pdf> accessed

23 April 2014

to the civilian population generally’.⁸ This requirement originates in Recital 26 of the Directive, which holds that ‘risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm’.⁹

In each of the Country Guidance cases relating to Afghanistan, claimants are consistently rejected for failing to produce evidence that they are at an ‘additional risk’ or at risk by reason of factors particular to their circumstances. In the case of *GS Afghanistan*, specifically where a country is not found to be in a situation of internal armed conflict, that applicant must prove that they are at serious risk over and above others.¹⁰ This would appear to place a burden on the applicant to prove exceptional circumstances in order to be considered for protection. However, the Court of Appeal after the case of *Elgafaji*¹¹ (upon which many cases currently going through the courts rely),¹² while finding the need for exceptional circumstances, did not find a need to define a test of exceptionality. They simply stated that the use of the word ‘exceptional’ in the case was to stress that it is not every armed conflict which will attract the protection of Article 15(c), but only one where the level of violence is such that, without anything to

⁸ UKBA, Operational Guidance Note: Afghanistan v9, 20 February 2012, 3.6.12

⁹ EC Qualification Directive, Recital 26

¹⁰ *GS (Article 15(c): indiscriminate violence) Afghanistan CG* [2009] UKAIT 00044

¹¹ *Elgafaji* [2009] 1 WLR 2100

¹² Based on evidence from the judgments from UK Country Guidance cases and the cases from failed asylum seekers in Kent

render them a particular target, civilians face real risks to their life or personal safety.¹³

In relation to this, the UNHCR has commented that, looking at the UK authority on the issue, 'it would appear that such levels of violence are in practice considered to be exceptional'.¹⁴ So in practice, exceptionality must be proved, but no formal 'exceptionality test' has been introduced. An argument could easily be made here, that introducing a test of exceptionality (or what would constitute 'exceptional circumstances' for the purpose of protection under Article 15(c)) would provide concrete criteria by which applicants could produce evidence to support their case, and courts could assess a case next to a stable set of requirements. Why has the concept of an 'exceptionality test' not been considered as a viable method for clarifying the burden of proof resting on applicants?¹⁵

Courts' attempts to provide definition to the wording in Article 15(c), rather than clarifying its meaning, appear only to have left a trail of further confusion and doubt as to its correct application and purpose. How do you establish an additional risk above that of the general population by particular factors, irrespective of identity, and yet satisfy the need for the risk to have resulted from violence that is indiscriminate? Additionally, if there is no exceptionality test, then what constitutes 'exceptional circumstances' for the purposes of proving additional individual risk?

¹³ *QD and AH v SSHD* [2009] EWCA Civ 620 [25]

¹⁴ UNHCR, *Safe At Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* (Geneva 2009) 32

¹⁵ *Elgafaji* [2009] 1 WLR 2100 – this idea was a general observation gleaned from assessment of the case and does not originate from any specific element of the case.

**Does Article 15(c) Provide any Additional Scope of Protection or is it Merely
Complementary to that Afforded by Article 15(a) and (b)?**

Another subject of contention relating to Article 15(c) is whether it requires a special standard of proof different from that applying in other cases under Article 15 (namely, cases under Article 15(a) and (b)).¹⁶ Looking specifically at the wording of each provision, 15(a) defines serious harm as ‘death penalty or execution’, and 15(b) as ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’.¹⁷ When comparing this to the wording in 15(c), a marked difference can be seen through the use of the word ‘threat’ in 15(c). Where (a) and (b) are defining types of actual harm, (c) covers a threat of harm. Helene Lambert and Theo Farrell, in their article on the ‘The Changing Character of Armed Conflict’, make the comment that ‘(c) has an added value being that it is concerned not just with actual harm but also with a lesser form of harm, that is, a threat of harm’.¹⁸ It would appear, therefore, that (c) covers a category of harm separate to those covered by (a) and (b) and therefore could be considered separately from them.¹⁹

However, in practice this appears more difficult. In reading through a selection of cases of failed Afghan asylum seekers in Kent, a common pattern

¹⁶ Paul Tiedemann, ‘Subsidiary Protection and the Function of Article 15(c) of the Qualification Directive’ (2012) 31 RSQ 124

¹⁷ EC Qualification Directive, Article 15(a) and (b)

¹⁸ Helene Lambert and Theo Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22 IJRL 242

¹⁹ *ibid*

in the refusal letters (in the cases where Article 15(c) was even considered²⁰) was the assessment of 15(c) under the heading of Protection under Articles 2 and 3 of the European Convention on Human Rights (ECHR). There are several issues with this. To establish some context, it must be understood that Member States, in accordance with Recital 25 of the Directive, are to introduce criteria for eligibility for subsidiary protection drawing from international obligations under human rights instruments and existing practices in that Member State.²¹ This is already in practice in terms of the interpretation of 15(a) and (b), as their wording is almost identical to that of Articles 2 and 3 ECHR.²² Therefore, given the provisions in Recital 25, it makes sense when attempting to establish harm under 15(a) and (b), to interpret them in light of Articles 2 and 3 ECHR. However, the same cannot be said for 15(c) whose wording is not replicated in any Article of the ECHR. Additionally if 15(c) is held to cover a 'lesser' form of harm than (a) and (b), then this argues that it has additional scope, and there is no logical reason why it should be considered under those headings, and not in its own right. This argument was reiterated in the case of *Elgafaji* where the comment was made that: 'article 15(c) is an autonomous concept whose interpretation must be carried out independently and without prejudice to fundamental rights as guaranteed by the ECHR'.²³

²⁰ Article 15(c) was considered in 12 out of 20 cases and out of those 12, only one considered 15(c) as a separate category of protection from serious harm as defined in (a) and (b) or Articles 2 and 3 ECHR.

²¹ EC Qualification Directive, Recital 25

²² Tiedemann (n 16) 120

²³ *Elgafaji* [2009] 1 WLR 2100 [28]

Countering this, a strong argument can be made for believing that 15(c) does not actually provide any additional scope or protection outside of (a) and (b) and therefore it is correct to consider (c) under Articles 2 and 3 ECHR.²⁴ One argument made in the case of *HH and Others* is that ‘in certain circumstances, a threat to a person can constitute inhuman or degrading treatment or punishment, contrary to article 3 ECHR, and thus constitute serious harm within Article 15(b)’.²⁵ Essentially, the judge in this case contends that the word ‘threat’ in 15(c) must lead to the types of harm as described in (a) and (b) and therefore (c) can never be divorced from the two or have any application broader than, or independent of them. But again, this interpretation seriously calls into question the purpose of 15(c). If it can have no application broader than (a) and (b), and one of these must be established in order to establish harm under (c), then why not just incorporate the type of harm in (c) into the provisions in (a) and (b)? Why have Article 15(c) at all?²⁶

Another relevant comment was made in the case of *AK Afghanistan* in relation to the consideration of Article 15(c) under Articles 2 and 3 ECHR: to assess whether Article 15(c) is engaged, should not lead to judicial decision makers going straight to Article 15(c). The normal course should be to deal with the issue of refugee eligibility, subsidiary protection eligibility and Article 3 ECHR in that order.²⁷

²⁴ Tiedemann (n 16) 123

²⁵ *HH and Others (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT 00022 [332]

²⁶ Tiedemann (n 16) 124 – general observation from the multiple arguments put forth in the article.

²⁷ *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC) [249]

This has particular relevance when looking at the cases of failed asylum seekers in Kent. Out of 20 examined cases, four did not even consider Article 15(c) in determining eligibility for subsidiary protection, and in those that did, only one considered it separately, and as having additional scope for protection beyond Articles 2 and 3 ECHR. Each of the remaining cases considered Article 15(c) under the headings of protection afforded by ECHR rights. This directly contradicts the statement in *AK* that consideration of Article 3 ECHR is to be dealt with *after* considering whether a claimant is eligible for subsidiary protection. It is fairly clear from this that courts are at sea as to how and when to apply Article 15(c) when assessing eligibility for subsidiary protection. Does it provide additional scope to Article 15(a) and (b)? Should it be interpreted separately from Article 2 and 3 ECHR?

What does 'Indiscriminate Violence in Situations of International or Internal Armed Conflict' mean and how is it Being Applied?

The definition of 'internal armed conflict' varies depending on which country a Member State is adjudicating on in a given case.²⁸ This is to be expected, given that the Qualification Directive is to be transposed into each Member State's national laws at their discretion.²⁹ But does this cause more harm than good? In an argument made for the extension of subsidiary protection, the comment was made that 'the term "internal armed conflict" is understood unevenly,

²⁸ Lyra Jakuleviciene, 'Is there a need for an extension of subsidiary protection in the European Union Qualification Directive?' (2010) 2(120) *Jurisprudencija* 215

²⁹ This is a general provision of EU law – Directives are not directly effective and must be transposed into the national laws of each Member State, at their discretion.

since there is no agreed definition of it in international law'.³⁰ This can cause difficulties in achieving the objective of the Directive which is to 'harmonise the criteria by which Member States define who qualifies as a refugee or other forms of protection'.³¹ For example, interpretations in different Member States have achieved different results: 'the situation in Iraq was considered as "internal armed conflict" in France, but not in Sweden where it was described as "severe conflict"'.³² The argument could be made here, that where certain Member States are known to be granting subsidiary protection to individuals as a result of internal armed conflict, but other Member States are not, a floodgates scenario can materialise.³³ Additionally, this difference in interpretation appears to accord some individuals subsidiary protection and not others. This is purely on the basis that one Member State, due to their discretion in interpretation, considers a country to be in a state of internal armed conflict and another does not, but the violence in that country remains the same regardless of the characterisation of that violence as 'internal armed conflict' – is this fair? Is it harmonising the criteria used by Member States to determine who qualifies as a person in need of subsidiary protection?

In UK cases, specifically the case of *GS Afghanistan*, indiscriminate violence was described as 'if a suicide bomber were to attempt to assassinate one individual in a crowded market place' or 'the bombing of insurgents who were sheltering in a school, or other area known to be populated by

³⁰ Jakuleviciene (n 28) 226

³¹ UNHCR, European Council on Refugees and Exiles, 'Brochure on the Qualification Directive' (2011)

³² Jakuleviciene (n 28) 226

³³ *ibid*

civilians’.³⁴ This leads to the assumption that civilian casualties in a particular area are a determining factor in whether a country is in a state of ‘internal armed conflict’ or an individual is at risk of ‘indiscriminate violence’. Indeed civilian casualties ‘generally provide a truer estimate of the severity of an armed conflict’,³⁵ however, as Lambert and Farrell argue, there is a ‘human security paradigm’, which also ought to be considered. This suggests that the severity of an internal armed conflict ‘needs to be assessed in the context of broader social impacts’.³⁶ The human security paradigm assesses whether a country is in a state of armed conflict through assessing both the numbers of people displaced from their homes, and chronic state failure leading to unsustainable communities through lack of basic services and a collapse of infrastructure.³⁷ Currently, the UK courts when dealing with Article 15(c) have only considered direct threats to life or person in terms of exposure to indiscriminate violence as a result of armed conflict or criminal acts, therefore using civilian casualties as the ‘measuring stick’ for determining the severity of a conflict.³⁸ However, Lambert and Farrell bring a very compelling argument that indirect threats, such as those contained in the human security paradigm, should be considered when assessing whether a country is in a state of internal armed conflict and when assessing the severity of the conflict. This would consequently provide Article 15(c) with the additional scope it requires,

³⁴ *GS (Article 15(c): indiscriminate violence) Afghanistan CG* [2009] UKAIT 00044 [62]

³⁵ Lambert and Farrell (n 18) 267 – a ‘truer’ estimate as opposed to the traditional characterisation of armed conflict through the numbers of battle casualties.

³⁶ *ibid* 267

³⁷ *ibid* 270

³⁸ *ibid* 266

and would widen the previously narrow interpretation it has received at the hands of judges.³⁹

With specific focus on Afghanistan, when looking at the risk to civilians in terms of indirect threats, cases have made comments on the current cultural and political state of Afghanistan.⁴⁰ The case of *AK* stated: ‘Afghanistan is not only war-stricken; it is riven by ethnic frictions, political factionalism, high levels of poverty, impunity, serious abuses of human rights by both state and non-state actors, ineffective governance, high levels of corruption’⁴¹ and the list goes on. In the same case, objective evidence was given from an Integrated Regional Information Networks report from July 2011 that ‘some 70% of the urban population of Kabul live in unplanned areas or in illegal settlements, with poor sanitation and lack of access to safe drinking water’.⁴² While that particular statement only relates to one area of Afghanistan, it is also the area where applicants are most commonly sent for relocation. Fuelling the argument for a broader application of Article 15(c), each of the indirect threats mentioned above could be assessed as elements pertaining to a threat to ‘life or person’. Evidence above shows that while proof of a direct threat to life as a result of indiscriminate violence can result in the provision of protection (though the threshold is high), indirect threats are not even considered. This is surprising as the effects of indirect threats are no different to the effects of direct threats (except perhaps, that indirect

³⁹ In terms of UK Country Guidance cases, where assessment of the severity of internal armed conflict is by the number of civilian casualties in a given geographical area.

⁴⁰ The cases of *AK* and *GS*.

⁴¹ *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC) [1]

⁴² *ibid* [80]

threats are damaging in both the short and long-term) and while applicants can rarely 'adduce sufficient evidence to prove there is a real risk to life or person'⁴³ as a result of direct threats, the indirect threats are not even accorded weight enough for consideration.

While a threat to 'life' is fairly straightforward, a threat to 'person' can cover a much wider remit and be applied on a broader scale. In the case of *HM and Others*⁴⁴ the Tribunal found that 'life or person' 'must extend to significant physical injuries, serious mental traumas and serious threats to bodily integrity'.⁴⁵ The judge went further to say that this broader definition 'has significance for the type of evidence relevant to establishing whether Article 15(c) is engaged. Such evidence cannot be confined to the numbers of casualties.'⁴⁶

Looking at the evidence then, it appears that Article 15(c) is currently interpreted so narrowly as to provide protection where a person's life is at risk of serious harm, but not their 'person'.⁴⁷ Or at least that yet another definition of the terms in Article 15(c) is lacking.

This contention that indirect threats should be considered when determining the severity of an internal armed conflict is reiterated when looking at Recital 10 of the Directive and the importance of respect for human dignity. Each of the factors related to indirect threats mentioned above has an

⁴³ Based on the case law of UK Country Guidance cases, and the cases of failed asylum seeker in Kent – where a common reason for refusal was the failure to adduce sufficient evidence to prove a direct threat to life or person.

⁴⁴ *HM and Others (Article 15(c)) Iraq CG* [2010] UKUT 331 (IAC)

⁴⁵ *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC) [76]

⁴⁶ *HM and Others (Article 15(c)) Iraq CG* [2010] UKUT 331 (IAC)

⁴⁷ *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC)

impact on human security and dignity, yet these are clearly not given much attention when it comes to the assessment of Article 15(c) claims.⁴⁸ While the concept of human dignity and security is not contained within Article 15(c) itself, it still retains importance through its incorporation into the Directive at Recital 10 which states: ‘this Directive seeks to ensure full respect for human dignity’. In arguing for a broader scope of application for Article 15(c) it could be said that human dignity falls under the definition of ‘life and person’ and should thereby be protected.⁴⁹

**Conclusion: Is There a Purpose to Article 15(c) and does it Provide any
Additional Rights to Applicants?**

It can be seen from the above discussion that Article 15(c) of the Qualification Directive has a very complicated (and in some cases contradictory) application. There have been clear difficulties in defining the terms within the provision such as ‘individual threat’ and ‘indiscriminate violence’ and while attempts have been made to define these terms, as in the case of *Elgafaji*,⁵⁰ they have not proved helpful. The definition of individual harm being ‘irrespective of identity’ still leaves a trail of questions as to what defines harm not related to identity and how this can be proved in order to bring an applicant within the scope of protection of Article 15(c). The lack of a test for exceptionality, where proof of exceptional circumstances is needed in order

⁴⁸ *HM and Others (Article 15(c)) Iraq CG* [2010] UKUT 331 (IAC) – general argument from a judgment in the case, [76]

⁴⁹ Helene Lambert, ‘The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence’ (2013) 25 IJRL 207

⁵⁰ *Elgafaji* [2009] 1 WLR 2100

for an applicant to succeed, only adds to the confusion of how to interpret and apply Article 15(c). Additionally, questions surrounding 15(c) providing scope for protection additional to that of 15(a) and (b) still remain, with arguments being made on both sides. On the one hand, cases such as *AK*, *Elgafaji* and *KH* argue that by virtue of the word 'threat' contained in 15(c), it covers a lesser form of harm than (a) and (b) and should thereby be considered separately from them. On the other hand, the case of *HH* contends that a 'threat' of harm must lead onto the actual harm as defined in (a) and (b) and therefore 15(c) can never have any meaning independent those earlier paragraphs.

Furthermore, the concept of 'internal armed conflict' has proved equally difficult to interpret and apply. The current application appears very narrow, with the numbers of civilian casualties used as the main determining factor of whether the conflict is severe enough to warrant protection. A strong argument can be made for the application of other factors as determinants of the severity of internal armed conflict, namely the human security paradigm. The numbers of internally displaced persons and the issue of chronic state failure leading to the unsustainability of communities are factors that are just as important as the numbers of civilian casualties resulting from armed conflict. To consider these factors would clarify the need for Article 15(c) to be considered separately from 15(a) and (b) and Article 2 and 3 ECHR and would accord more definition to the term 'life or person' contained within 15(c).

There is clearly a general lack of concrete definition or criteria by which Member States, specifically the UK, can apply this element of the Directive,

and as a result, applicants are rarely being accorded this type of subsidiary protection. It does not appear to be providing any additional rights to applicants, as cases are rarely successful, and even the judgments of failed applications attest to the fact that interpretation and application of the Directive is unclear. How can Article 15(c) provide any rights, when applicants do not know how to fulfill the criteria, and judges are uncertain on its interpretation? These difficulties are all evidenced through several Country Guidance cases, and local cases of failed asylum seekers. The same patterns emerge in each case, bringing to light the idea that the courts have lost their way, and that this ultimately leads to a lack of access to justice.

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